Chapter 23[1]

Defining 'Human Rights Harm' in Practice: The Uncertainty Underpinning Business and Human Rights Tort Litigation

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Abstract: This chapter is written from the practitioner perspective. We explore a practical challenge to corporate human rights accountability: the uncertain legal standard of care. Our argument proceeds in five stages. *First*, we provide an overview of the emerging framework of corporate human rights responsibility in voluntary standards and law. *Second*, we highlight the importance of transnational torts—particularly styled as negligent risk management — in the emerging web of potential legal accountability for companies that fail to respect human rights. But this discussion comes with a meaningful caveat: to date, no court has determined the legal standard of care for a company in such cases. *Third*, we turn to the contours of a potential standard of care grounded in the UN Guiding Principles on Business and Human Rights. Drawing on an archetypal fact pattern involving mining company impacts on environmental rights, we illustrate why the best candidate against which to assess the effectiveness of a parent company's management of human rights risks is the Guiding Principles. *Fourth*, we turn to the practical risk-management requirements of the Guiding Principles to illustrate that an effective system would be grounded in a set of consistent indicators of harm derived from international human rights law. *Fifth*, we focus on the scope of the right to health under international law to illustrate the complexity of deriving meaningful, principled, and practical definitions of harm to integrate in a company's Guiding Principles-aligned risk-management system. The implication of this argument is that 'business and human rights litigation' will remain limited in what remedies it can meaningfully deliver to stakeholders until we have an authoritative method to establish what constitutes a corporate wrong with reference to international human rights law.

Key words: human rights; standard of care; transnational tort; Guiding Principles; adverse impact

1. Introduction

1.1 Preamble: Our Perspective as Corporate Human Rights Counsel

This chapter is written from the practitioner perspective. But there are many kinds of practitioners, and it is important to specify the authors' role to avoid any misreading of our intent or this chapter's argument. We are lawyers but not litigators. Our role is not to seek defenses in the law to protect companies from accountability for human rights-related harms. To the contrary, we are engaged by companies to help *identify and address* human rights risks and impacts. In that capacity, we aspire to wise counsel, concerned with our clients' long-term integrity. That perspective shapes the structure and flow of our argument in fundamental ways.

We explore in this chapter a practical challenge to corporate human rights accountability: the uncertain legal standard of care. In making our argument, however, it is not with the aim of offering companies a

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roadmap to defend themselves in court. We explore this challenge because it is among the greatest we face when advising clients on how best to meet their human rights responsibilities in complex contexts. We therefore advance the arguments in this chapter as a plea to the business and human rights legal community — academics, judges, regulators, and civil society — to resolve pressing gaps in the law before they harden into perpetual uncertainty.

1.2 Navigating the Uncertainty: Overview of the Chapter

Given the tenor of many chapters in this book, the implications of an uncertain legal standard of care for corporate human rights accountability can seem abstract, limited, and remote. They are none of these things. As we will endeavor to illustrate, the seeds of a dangerous uncertainty for corporate accountability have already been sown. If left to flourish unchecked, we will see the fruits in several different ways: wildly diverging approaches taken by companies of similar sizes in similar sectors to address similar risks; inconsistent measures of corporate respect for human rights by rankings agencies, auditors, and regulators; perverse incentives created by the selection of corporate targets for human rights litigation; and, perhaps most importantly, a possibly repeated frustration for stakeholders when seeking legal accountability on the merits for human rights harms.

Our argument proceeds in five stages. First, we provide an overview of the emerging framework of corporate human rights responsibility[3] in voluntary standards and law. The United Nations Guiding Principles on Business and Human Rights (Guiding Principles)[4] play a critical normative role here by introducing a governance-based definition of business 'respect for human rights' to ground a human rights standard of care for civil liability.

Second, we highlight the importance of transnational torts — particularly styled as negligent risk management — in the emerging web of potential legal accountability for companies that fail to respect human rights. But this discussion comes with a meaningful caveat: human rights-related transnational tort litigation has thus far largely been confined to determining whether the defendant parent company owes a duty of care to the foreign plaintiff alleging human rights-related harm. To date, no court has determined the legal standard of care for a company in such cases.

Third, we turn to the contours of a potential standard of care grounded in the Guiding Principles. We advance here a normative argument that, for transnational tort litigation meaningfully to be treated as 'business and human rights litigation' as styled in this text,[5] the standard of care should be defined with reference to 'human rights harm' understood as wrongs under international human rights law not national law in the place of injury. Drawing on an archetypal fact pattern involving mining company impacts on environmental rights, we illustrate why the best candidate against which to assess the effectiveness of a parent company's management of human rights risks is the Guiding Principles.

Fourth, we turn to the practical risk-management requirements of the Guiding Principles to illustrate that an effective system would be grounded in a set of consistent indicators of harm derived from international human rights law. We illustrate the practical challenge this creates for developing a justiciable standard of

[3] Corporate human rights 'responsibility' is distinct from 'accountability'. The former refers to legitimate expectations of corporate conduct based on voluntary commitments, authoritative standards, and law. Accountability is focused on avenues and mechanisms to enforce corporate responsibility. While the terms are related, companies will likely only be held accountable for a subset of their human rights responsibilities.

[4] OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011), HR/ PUB/11/04 [Guiding Principles].

[5] 'Accordingly, the book adopts a broad, umbrella definition of "business and human rights litigation" as "legal actions that address the responsibilities of businesses for human rights harm, including those that seek accountability, remedy or deterrence of harmful corporate conduct."

care by exploring how to wrestle with the changed meaning of the right to health when considering the design of a corporate risk-management system. Herein lies the practical challenge for designing and implementing effective human rights due diligence: like most areas of international law, international human rights law and commentary do not specify the duties borne by private actors.

The implication of this argument is that business and human rights litigation will remain limited in what remedies it can meaningfully deliver to stakeholders until we have an authoritative method to establish what constitutes a corporate wrong with reference to international human rights law, which would need to underpin a justiciable standard of care for corporate harms. Without such a standard, meaningful tort-based human rights liability may be a chimera — at least as a vehicle for seeking accountability for corporate harm on internationally recognized human rights.

2. The Evolution of Business and Human Rights as Law

2.1 The Emergence of a Legal Definition of Business Respect for Human Rights

Business and human rights has evolved into a legal discipline at a breakneck pace. Not long ago, respected legal scholars could safely find that corporate responsibility 'does not appear to fit comfortably within a traditional legal setting' because law endeavors to 'clarity and precision (…) [in] seeking a definition of key terms and concepts or guidance on what constitutes acceptable forms of conduct'.[6] Corporate responsibility as a concept intrinsically lacked such virtues: it reflected an *ideal* of ethical behavior embracing the interests of 'stakeholders' beyond shareholders, but that ideal was subject to few shared metrics of right practice.[7]

Various iterations of voluntary standards and faltering efforts to create law culminated in the Guiding Principles[8] in 2011, which have since become the cornerstone of corporate responsibility as a legal discipline. The Guiding Principles have since been widely embraced by governments, industry associations, businesses, international organizations, and bar associations.[9] In recent years, they have been integrated into regulatory frameworks — notably the European Union Corporate Sustainability Due Diligence Directive (CS3D)[10] — and major judicial decisions across jurisdictions, including many cited in other chapters of this book.[11] The Guiding Principles reframe the social dimension of corporate responsibility in the language of rights. They are built on three 'pillars' — protect, respect, and remedy — conceived for the Guiding Principles to apply comprehensively to all states and business enterprises.

The Guiding Principles' novel contribution was a practical framework to understand the scope of business responsibility for human rights *as distinct from* the state responsibility for rights. While states are expected to 'protect' human rights, businesses are responsible for 'respecting' them. Respect is defined by the strength of corporate risk-management policies and protocols, broadly comprised of: (1) a policy commitment; (2) a due diligence process; and (3) a remediation process (including grievance mechanisms).[12] The core of this system is due diligence, which has a legally idiosyncratic meaning, to

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[6] Michael Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis Canada 2009) 5

[7] Ibid. 6-7.

[8] United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

[9] See Yousef Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies,' (2014) 60 Rocky Mt Min L Inst 19-1, §19.02; see also J. F. Sherman III, 'The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility' (Shift Project 2012) 6.

[10] European Parliament and Council Directive on Corporate Sustainability Due Diligence 2024/1760, 2024 O.J. (L) [hereafter 'CS3D'].

[11] See *Milieudefensie et al. v Royal Dutch Shell plc*, No. C/09/571932 (Hague Dist. Ct. May 26, 2021).

[12] Guiding Principles (n 2) GP 15.

capture steps from assessment to disclosure: 'The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.'[13]

The governance-based understanding of responsible corporate behavior marked a fundamental transition of corporate responsibility from elusive, reputation-focused pursuit to a harder-edged legal discipline, subject to meaningful regulation and litigation across jurisdictions. While clothed in the garb of international human rights law, the Guiding Principles are at their core a risk-management framework that tracks the structure of corporate compliance expectations familiar to business from the corruption and money-laundering contexts. To illustrate:

- *Policy Commitment*: The Guiding Principles provide that businesses should have a policy commitment to respect human rights that is publicly available, reflected in operational policies and procedures, and communicated to all personnel.[14] The US Department of Justice (DOJ) notes that a 'well-designed compliance program utilizes policies and procedures to give both content and effect to the ethical norms' framing its risk management.[15]
- *Due Diligence*: The Guiding Principles provide that corporate due diligence '[s]hould cover adverse impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.'[16] The DOJ specifies that corporate compliance programs should be 'designed to detect [and prevent] the particular types of misconduct most likely to occur in a particular corporation's line of business.'[17]
- *Remediation Processes*: The Guiding Principles emphasize the importance of processes 'for grievances to be addressed early and remediated directly.'[18] The DOJ highlights that a 'hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously report allegations' of non-compliance.[19]

This familiar, practical, and governance-based structure enables the Guiding Principles to inform meaningful regulation of corporate human rights risk-management programs, even where the risks companies are expected to manage are extraterritorial. On the regulatory front, governments have attempted different routes to regulate business-related human rights impacts across borders. The most ambitious laws—such as the CS3D, Germany's Supply Chain Due Diligence Act (LkSG),[20] Norway's Transparency Act,[21] and the French Loi de Vigilance[22] — mandate due diligence covering a broad array of human rights and reaching several tiers deep into corporate supply chains. These are complemented by more targeted,

[13] Ibid. GP 17.
[14] Ibid. GP 16.
[15] US Department of Justice Criminal Division, 'ECCP Revision 2024 0922 (FINAL CLEAN)' at 1 (US Department of Criminal Justice 2024) <www.justice.gov/criminal/criminal-fraud/page/file/937501> accessed 31 October 2025 [hereinafter 'ECCP Guidance 2024'].
[16] Guiding Principles (n 2) GP 17.
[17] ECCP Guidance 2024 (n 13) at 1.
[18] Guiding Principles (n 2) GP 29.
[19] ECCP Guidance 2024 (n 13) at 2.
[20] Leiferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, Bundesgesetzblatt, Teil I [BGBL. I] at 2959 (Ger.).
[21] Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)], July 1, 2022, Lovvedtak 176 (2020–2021).
[22] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], Journal Officiel de la République Française [J.O.] (28 March 2017).

sector-specific regulation, such as the European Union Batteries Regulation,[23] Deforestation Regulation,[24] and Conflict Minerals Regulation.[25] Each of these laws, among many others,[26] draws on the Guiding Principles' governance-based structure to delimit corporate human rights responsibility.

In parallel to proliferating regulation, human rights-related litigation against companies has also been evolving at a rapid pace. The most prominent ground of such claims was long the United States (US) Alien Tort Statute (ATS),[27] which provides for federal court jurisdiction to adjudicate torts based on violations of 'the law of nations' including human rights that have become part of customary international law. Since 2013, however, the US Supreme Court has limited the ATS's reach in a series of decisions,[28] which has encouraged claimants to look for other avenues in US federal and state courts — as well as in other countries.[29] These are grounded in a variety of theories of liability, from misrepresentation[30] to statutory harms,[31] to securities violations,[32] among others.[33] The most notable thread of such claims across jurisdictions, however, is transnational tort litigation, framed as negligent risk management (typically) by a corporate parent related to human rights-related harms committed by, or most closely tied to, a foreign subsidiary. It is to the structure of those claims to which we now turn.

2.2 Transnational Torts as Business and Human Rights Litigation

Transnational torts offer a far more flexible route to corporate liability for injury than ATS suits.[34] Virtually every human rights claim can be framed in tort terms.[35] In US courts the distinction means that plaintiffs do not have to: (1) pass the high threshold of demonstrating that the alleged wrong is prohibited under customary international law; (2) prove any element of intent beyond negligence; (3) prove a government nexus to abuse; (4) meet the higher pleading thresholds in federal court; or (5) meet the stricter *forum non conveniens* concerns of federal courts.[36]

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[23] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.
[24] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.
[25] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[26] See, e.g., Modern Slavery Act 2015, c. 30 (UK); Modern Slavery Act 2018 (Cth) (Austl.); An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff, Bill S-211, 1st Sess., 44th Parl., 2022 (Can.); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2019).
[27] 28 U.S.C. § 1350 (2012).
[28] *Kiobel v Royal Dutch Petroleum*, 569 U.S. 108 (2013); *Jesner v Arab Bank*, PLC, 138 S. Ct. 1386 (2018); and *Nestle USA, Inc. v Doe*, 141 S.Ct. 1931 (2021).
[29] Rae Lindsay, 'Multinational Human Rights Litigation from the Perspective of Business' in R. Meeran (ed), *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021) 285.
[30] See, e.g., *Dana v Hershey Co*. 180 F. Supp. 3d 652, 2016 U.S. Dist. LEXIS 41594 (N.D. Cal. March 29, 2016); see also, Business & Human Rights Resource Centre, 'Germany: NGOs file consumer complaint against Lidl over working conditions in its Bangladeshi textile suppliers' (*Business & Human Rights Resource Centre*, 6 April 2010) <www.business-humanrights.org/en/germany-ngos-file-consumer-complaint-against-lidl-over-working-conditions-in-its-bangladeshi-textile-suppliers> accessed 31 October 2025.
[31] *See Doe v Apple Inc*., 2021 WL 5774224 (D.D.C. Nov. 2, 2021). See also *Mia v Kimberly Clark Corp*., Case No. 1:22-CV-02343 (D.D.C. Aug. 9, 2022).
[32] See, e.g., *SEC v Vale S.A.* No. 1:22-cv-02405 (E.D.N.Y. Apr. 28, 2022); *see also*, *In re Tahoe Resources, Inc. Securities Litigation*, Notice of Pendency and Proposed Settlement of Class Action Lawsuit Pending in United States District Court for the District of Nevada (Case No. 2:17-cv-01868-RFB-NJK).
[33] *Jabir and others v KiK Textilen und Non-Food GmbH* (case No. 7 O 95/15) (Germany).
[34] See Roger P. Alford, 'Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation' (*OpinioJuris*, 17 April 2013) <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/> (accessed 31 October 2025) ('Human rights litigation is about grave public wrongs; transnational tort litigation is about redressing simple private wrongs').
[35] Ibid.
[36] Ibid.

Even prior to the US Supreme Court's ruling in *Kiobel*, foreign plaintiffs had begun pursuing tort actions against US-based companies for transnational human rights injury, in both federal and state courts. In *Bowoto v Chevron Corp.*,[37] the US District Court for the Northern District of California held that California's substantive law applied to the negligence claim by Nigerian plaintiffs against a California-based company for injuries suffered in Nigeria.[38] Similarly, in *Doe v Exxon Mobil Corp.*,[39] which concerned activities in Indonesia, the US Court of Appeals for the DC Circuit held that DC and Delaware law should apply because the United States 'has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens […] conducting business in one or more foreign countries'.[40] And, in *John Doe I v Unocal Corp.*,[41] once the ATS claims were dismissed, Burmese plaintiffs were able to assert all of their ATS claims as state common law torts claims. The case proceeded to discovery before Unocal Corporation agreed to a settlement.[42]

These cases concerned particularly egregious allegations of harm involving foreign militaries. Given the nature of the harms alleged, these cases each combined allegations of (1) intentional torts — e.g., wrongful death, battery, assault, false imprisonment, intentional infliction of emotional distress, and conversion; (2) vicarious liability for the intentional torts of the military with whom the company engaged; and (3) liability in negligence for creating, or failing appropriately to manage, a foreseeable risk of harm by its employees or those of its subsidiaries.[43] More recently, *Doe v Chiquita Brands Int'l Inc*[44] confirmed the availability of state common-law liability for US-based parent companies for involvement with foreign paramilitary or private security operations, with a Florida jury finding the company liable in tort for various abuses perpetrated by the United Self-Defense Forces of Colombia, a paramilitary group deemed a global terrorist organization by the US government.[45]

Outside the United States, courts in Canada and the United Kingdom have been at the vanguard of assessing and defining potential parent-company liability under tort law for human rights-related harms most closely tied to foreign subsidiaries. The Canadian case of *Choc v Hudbay*[46] involved three related actions brought by indigenous Mayan Q'eqchi' from Guatemala against Hudbay Minerals Inc. (Hudbay) and its Guatemalan subsidiaries.[47] The claim alleged Hudbay's negligence in failing to prevent the harms committed by security forces.[48] Hudbay sought to dismiss the claim on the basis that there was no duty of care owed by a parent to the plaintiffs affected by the actions of a foreign subsidiary.[49] The court rejected Hudbay's submissions.

The most significant element of the ruling was the finding of a potential duty owed directly by the parent company to the foreign plaintiffs—and not simply based on piercing the corporate veil: '[T]he plaintiffs have pled all material facts required to establish the constituent elements of their claim of direct negligence as against Hudbay, *separate and distinct from any claims framed in vicarious liability as against it*.'[50] To

[37] 2006 U.S. Dist. LEXIS 63209 (N.D. Cal. August 22, 2006).
[38] Ibid. at 7.
[39] 654 F.3d 11 (D.C. Cir. 2011), vacated, 527 F. App'x 7 (D.C. Cir. 2013) (mem.).
[40] 654 F.3d 11 at 70 (D.C. Cir. 2011), quoting *Doe v Exxon Mobil Corp.*, 2006 U.S. Dist. LEXIS 11732 at 6 (D.D.C. March 2, 2006).
[41] 2002 Cal. Super. LEXIS 5207 (Cal. Super. Ct. June 11, 2002).
[42] See P. Hoffman & B. Stephens, 'International Human Rights Cases Under State Law and in State Courts' (2013) 3 UC Irvine L Rev 9, 16.
[43] *Doe v Unocal* 2002 Cal. Super. LEXIS 5207 and *John Doe VIII, et al. v Exxon Mobil Corp., et al.*, No. 09-7125 (D.C. Cir. 2011).
[44] 2022 U.S. Dist. LEXIS 248154.
[45] Plea Agreement, D.E. 11, *United States v Chiquita Brands Int'l*, Case No. 07-CR-00055-RCL (D.D.C. Mar. 19, 2007).
[46] *Choc v Hudbay Minerals Inc.*, [2013] O.J. No. 3375, 2013 ONSC 1414, 116 O.R. (3d) 674 (Ont. S.C.J.).
[47] Ibid. at para 4.
[48] Ibid. at para 52.
[49] Ibid. at para 18.
[50] Ibid. at para 54 [emphasis added].

reach this conclusion, the court highlighted Hudbay's public representations regarding 'its commitment to respecting human rights', which would have grounded the plaintiffs' expectations, as well as the mining project context, which necessarily engaged the plaintiffs' interests.[51]

Courts in the United Kingdom have also recognized potential private law claims against UK-domiciled parent companies for extraterritorial human rights abuses and have begun to elucidate the nature of a parent company duty of care. This duty began to take shape in *Chandler v Cape plc*.[52] The claimant in that case was an employee of the defendant parent company's wholly owned subsidiary in South Africa who contracted asbestosis in the course of his employment. The parent company accepted that its subsidiary had failed in its duty of care toward the claimant. At issue was whether the parent itself owed such a duty to the claimant directly.[53]

The Court of Appeal held that a parent company may owe a duty of care to its subsidiaries' employees where, *inter alia*, it is 'fair, just and reasonable.'[54] This turns on four factors:

1. the businesses of the parent and subsidiary are in a relevant respect the same;
2. the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
3. the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
4. the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[55]

Chandler's implications for broader corporate human rights liability — beyond subsidiary employees — were tested in a trio of subsequent cases. *AAA and others v Unilever plc and another company*[56] concerned violence following the 2007 Kenyan presidential elections. Employees of Unilever's Kenyan subsidiary argued that the UK-domiciled parent was liable for a failure to adopt adequate safeguards to protect them from injury. In *Lungowe and others v Vedanta Resources plc and another*,[57] Zambian plaintiffs brought a claim against a UK-domiciled holding company and its Zambian subsidiary alleging environmental damage caused by copper mine operations. The claimants argued that the holding company had assumed responsibility over the relevant subsidiary's operations due to the high level of control and direction that the former exercised over the latter.[58] In *Okpabi and others v Royal Dutch Shell plc and another*,[59] the claimants sought damages arising as a result of alleged ongoing pollution and environmental damage caused by oil leaks from pipelines.

The English Supreme Court ultimately resolved the issue of parent companies' potential duty of care with reference to non-employees affected most directly by the conduct of foreign subsidiaries in *Vedanta*[60] and *Shell*[61] in 2019 and 2021, respectively. The core principle emerging from these cases affirmed *Chandler* to hold that separate corporate personality does not a preclude a parent from owing a direct duty of care to

[51] Ibid. at para 69.
[52] *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 3 All E.R. 640.
[53] Ibid. at paras 1-3.
[54] Ibid. at para 32.
[55] Ibid. at para 80.
[56] *AAA and others v Unilever plc and another company* [2017] EWHC 371, [2017] All E.R. (D) 07 (Q.B.).
[57] *Lungowe and others v Vedanta Resources plc and another* [2016] EWHC 975, [2016] All E.R. (D) 60 (T.C.C.).
[58] Ibid. at paras 31-32.
[59] *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191, [2018] Bus L R 1022.
[60] *Vedanta Resources plc & another v Lungowe & others* [2019] UKSC 20.
[61] *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3.

plaintiffs affected most directly by the operations of a foreign subsidiary: 'Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.'[62] Importantly, however, the Supreme Court emphasized that there is nothing unique about the parent-subsidiary relationship in determining whether such a duty exists: 'the general principles which determine whether A owes a duty of care to C in respect of harmful activities of B are not novel at all.'[63]

A conventional tort posture for transnational human rights claims is also gaining traction outside the common-law world. In the Netherlands, *Milieudefensie et al. v Royal Dutch Shell plc*[64] concerned whether Shell violated a duty of care by failing to take actions to reduce its contributions to climate change. The district court ruled in favor of the plaintiffs, relying on business and human rights standards, among others, to find that Shell has a 'social duty of care'[65] to reduce its carbon emissions by 45%.[66] This decision was overturned by the Hague Court of Appeals in November 2024.[67] The court held that, while Shell has a 'special responsibility'[68] to reduce its greenhouse gas emissions as part of its 'social duty of care,'[69] that does not mean that Shell has any absolute emissions reduction obligation beyond those specified in statute.[70]

These cases are by no means exhaustive. They are, however, reflective of a trend to seek transnational corporate accountability for human rights-related injury through civil claims styled as negligence suits.[71] As *Shell*, *Vedanta*, and *Milieudefensie* illustrate, the scope of potential injuries grounding negligence claims is expanding beyond the well-canvassed security context to include environmental and other harms to communities. The potential remains nascent and unexplored, however, as none of these cases — and none we have canvassed — involved a court determining what the specific standard of care is for the conduct of the defendant company. It is to that challenge we now turn.

3. Defining the Standard of Care for Corporate Human Rights Accountability

3.1 Framing the Pursuit of a Standard of Care Grounded in International Human Rights

Milieudefensie highlights the unexplored frontier of tort-based corporate human rights litigation: companies may owe stakeholders a 'social duty of care,' but we do not yet know its contours. That is, we do not yet know exactly what measures a reasonable multinational company must implement as a matter of law to fulfil its putative social duty of care, particularly to individuals and groups in foreign jurisdictions who are most directly affected by the actions of separate legal entities. In none of the negligence-styled business and human rights cases discussed above has a court yet determined on the merits whether a company has breached the relevant standard of care. This is a fundamental challenge for the future of corporate human rights litigation: without clear and predictable guidance regarding the measures a company must take to meet its human rights-related duties, it will be difficult for stakeholders to secure redress through the courts for corporate human rights harm, for the standard defines what plaintiffs can reasonably expect of companies vis-à-vis their dignity interests — and thus what conduct gives rise to liability.

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[62] *Vedanta Resources plc & Another v Lungowe & Others* [2019] UKSC 20 at §49.
[63] Ibid. at 54.
[64] *Milieudefensie et al. v Royal Dutch Shell Plc*, Case No. C/09/571932 / HA ZA 19-379, 26 May 2021.
[65] Ibid. at paras 7.24 – 7.27. See also paras 7.55 – 7.62.
[66] Ibid. at paras 4.3.4 – 4.3.6; 4.4.37; 4.5.3 – 4.5.5.
[67] *Shell Plc v Milieudefensie et al*, ECLI:NL:GHDHA:2024:2100 (Court of Appeals, The Hague, 12 November 2024). Unofficial English translation available here: <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100> accessed 31 October 2025.
[68] Ibid. at para 7.79.
[69] Ibid. at paras 7.24 – 7.27. See also paras 7.55 – 7.62.
[70] Ibid. at para 7.56.
[71] Richard Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) 6 Bus and Human Rights J 255.

As we are wading into uncharted waters, the discussion that follows is normative. We do not endeavor to predict how transnational tort law will develop in any specific jurisdiction, let alone across them. Rather, we seek to illustrate the pitfalls for stakeholders and businesses alike in the current trajectory of such claims, at least to the extent they are fairly considered 'business and human rights litigation' as defined in this text.[72] 'Human rights harm' is central to this definition. Human rights are distinct from other rights in that they are intrinsic to all individuals, irrespective of the political regime to which they are actually subject.[73] Human rights harms thus exist beyond the framing and limits of national law: a person's human rights may be abridged even if the injuring party acted in accordance with law in the place of injury. The stakeholder interests that business and human rights litigation should seek to protect or redress should accordingly be grounded in international human rights law. Where the interest is framed in non-human rights terms — as in the tort cases surveyed above — the underlying interest itself must at least substantially overlap with the interests recognized by international human rights law, so that the reframing as a human rights claim would be only a nominal, not substantive, change.[74]

That is not to say the standard of care should flow from international human rights law (to the best of our knowledge, no such standard exists). Rather, the relevant risks to people that the defendant business is asked to consider and address should be defined with reference to internationally recognized human rights. Otherwise, the human rights element of the definition risks becoming decorative. A company might plausibly claim to respect (1) freedom of association while refusing to bargain collectively in a country that severely limits union registration and membership; (2) equality rights while discriminating against women in a patriarchal society; (3) the prohibition on forced labour while confiscating worker passports in a country where that is customary and permitted; and (4) the right to health while contaminating local freshwater sources with dangerous effluents in ways permitted by national environmental regulation — among virtually limitless other conceivable harms that are well accepted under international human rights law but not protected in many countries.

The relevant corporate standard of care for business and human rights litigation — albeit one flowing from the national law of the home or host country — should accordingly define how a reasonable business effectively manages risks to individuals' internationally recognized human rights. The care to be exercised by the defendant company under such a standard would need to be directed to identifying and addressing human rights as fundamental dignity interests grounded in a supranational legal framework. To date, however, such a standard remains elusive.

To illustrate the practical challenges with corporate human rights accountability — specifically those flowing from an uncertain standard of care — we outline below an archetypal fact pattern involving a mining company:

> MiningCo, headquartered in London, is one the largest iron ore producers in the world. Among its assets is a mine in Brazil used to extract iron ore, operated by its wholly owned subsidiary, MiningCo Brazil (MCB). The MCB tailings dam collapsed and flooded the surrounding areas with toxic waste. Hundreds are dead, and more are injured and displaced,

[72] '[L]egal actions that address the responsibilities of businesses for human rights harm, including those that seek accountability, remedy or deterrence of harmful corporate conduct.' Rachel Chambers, Hassan Ahmad and Ekaterina Aristova 'Introduction: The Evolving Landscape of Business and Human Rights Litigation' in H. Ahmad, E. Aristova, and R. Chambers (eds) *The Cambridge Handbook of Litigating Business and Human Rights Violations: Themes, Perspective, and Prospects* (Cambridge University Press 2026).

[73] Lynn Hunt, *Inventing Human Rights: A History* (W.W. Norton & Co. 2007) 20.

[74] For instance, if we were to deem any intellectual property dispute between two artificial intelligence companies as 'business and human rights litigation' because it concerned Article 17 of the Universal Declaration of Human Rights, this book would have few substantive limits.

in the neighboring community (NCom); the environmental toll on communities downstream (DCom) from the mine may take years to apprehend.
MiningCo is sued in England for negligent risk management by members of NCom and DCom. The court finds that MiningCo owes a duty of care to both communities under the principles of Shell and Vedanta, in part because MiningCo has publicly committed in its Human Rights Policy, Supplier Code of Conduct, and Employee Code of Ethics to "respect human rights in line with the UN Guiding Principles on Business and Human Rights." MiningCo is also a member of the International Council on Mining and Metals, a global industry association that brings "together a third of the global metals and mining industry."[75]

If we move to the merits of this litigation, one of the core questions for the court would be to define the standard of care: what measures would a reasonably prudent company in a situation like MiningCo have taken, as a parent company, to identify and address the risks to NCom and DCom related to MCB's conduct in Brazil (or any other jurisdiction)? The question would in practice be a nuanced one of mixed fact and law, likely involving several lines of inquiry related to the alleged harm, regulatory and industry guidelines for the treatment of mining waste and the building of tailings dams, core corporate governance expectations of UK- and Brazil-based mining companies, and MiningCo's own practice in managing aspects of subsidiary operations.[76] As a baseline, however, if this kind of case were properly to be considered business and human rights litigation, the relevant standard of care for MiningCo would also ideally establish the company's practical risk-management responsibilities with reference to internationally recognized human rights, not merely overseeing compliance with local law.

The relevant human rights standard of care to assess MiningCo's alleged negligence in this case would need to provide a framework (1) for risk management related to human rights harms (2) in foreign jurisdictions (3) even if most closely tied to subsidiaries or other business partners that is (4) not limited to compliance with national law in the place of injury. Given the bare facts above, the best candidate for this standard would be the Guiding Principles. First, the Guiding Principles were unanimously adopted by the UN Human Rights Council and have since been endorsed by many governments, including the United Kingdom,[77] Brazil[78] and all members of OECD as the practical human rights risk-management framework for business.[79] Second, the Guiding Principles are expressly endorsed by the International Council on Mining and Metals, of which MiningCo is a member, and the Brazilian Mining Association, with members representing 85 percent of Brazil's mineral pr=duction.[80] Third, the Guiding Principles were expressly

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[75] International Council of Mining and Metals, 'Our Story' (*ICMM*) <www.icmm.com/en-gb/our-story/our-members> accessed 31 October 2025.

[76] See, e.g., *Cape* (n 50) at paras 72-80.

[77] UK Government Foreign and Commonwealth Office, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (*UK Government Foreign and Commonwealth Office,* 2016) at 14 <www.gov.uk/government/publications/bhr-action-plan> accessed 31 October 2025 ('The [Guiding Principles] guide the approach UK companies should take to respect human rights wherever they operate.').

[78] Flávia do Amaral Vieira, 'The Implementation of the Guiding Principles on Business and Human Rights in Brazil: A Critical Perspective' (2021) 11 Revista Internacional de Derechos Humanos 2; Christiane Lucena Carneiro and Nathalie Albieri Laureno, 'Regulatory Initiatives on Business and Human Rights in Brazil—From the Domestic to the International and Back' (*Business and Human Rights Journal Blog*, 19 June 2024), <https://bhrj.blog/2024/06/19/regulatory-initiatives-on-business-and-human-rights-in-brazil-from-the-domestic-to-the-international-and-back/> accessed 31 October 2025 ('In December 2018, the [Brazilian] federal government issued Federal Decree 9.571/2018, establishing the National Guidelines on Business and Human Rights, which endorsed and reproduced the [Guiding Principles] content and structure.').

[79] See OECD, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (OECD Publishing 2023) at para 41 (The Human Rights Chapter 'draws upon draws upon the United Nations 'Protect, Respect and Remedy Framework for Business and Human Rights' and is in line with the Guiding Principles on Business and Human Rights for its implementation (…)').

[80] International Council on Mining and Metals 'Mining Principle 3' (*ICMM*) ('ICMM members undertake to uphold the UN Guiding Principles on Business and Human Rights (...)') <www.icmm.com/en-gb/our-principles/mining-principles/principle-3>

endorsed by MiningCo in three public policies. As the UK Supreme Court held in *Vedanta*: 'the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so.'[81] While that holding focused solely on jurisdiction, the scope of a responsibility voluntarily assumed would arguably need to align with the scope of the voluntary assumption.[82]

If the court were to seek a standard of care for MiningCo to follow in managing risks of human rights harm to NCom and DCom, the best candidate would be the Guiding Principles. Moreover, even if the court were to not seek a specific human rights standard of care, the Guiding Principles could plausibly be advanced as a critical component of the applicable standard for MiningCo.'s enterprise-level risk-management system to identify and address potential harms to communities in foreign jurisdictions, because of the government policy, industry practice, and corporate representations cited above — all of which can help inform the standard of care.[83] The question to which we now turn is whether the Guiding Principles can, in fact, serve as a justiciable standard of care to ground tort litigation regarding MiningCo's human rights responsibilities.[84] We first outline the core risk-management expectations of companies under the Guiding Principles. We then home in on defining the practical risk indicators of human rights harm that underpin an effective system, to illustrate a latent uncertainty in relying on the Guiding Principles to frame a justiciable corporate human rights standard of care.

3.2 Operationalizing the Guiding Principles as the Standard of Care

As discussed above, the novel contribution of the Guiding Principles was to frame corporate human rights responsibility in compliance concepts familiar to companies from other enforcement contexts. Arguably, that framing has laid the foundation for the Guiding Principles to become an enforceable standard of care, by establishing the constituent elements of an effective human rights risk-management program. Broadly, these are four:

1. A public policy commitment to respect human rights across their operations and value chain that is approved at the most senior levels of the company, identifies expectations of employees and business partners, and is integrated in relevant policies and processes across the enterprise.[85]
2. A due diligence process to identify, prevent, mitigate, and account for how the company addresses human rights harms with which it is involved directly or indirectly across its

accessed 31 October 2025; Brazil Mining Association (IBRAM), 'Value Beyond Compliance' (IBRAM 2020) <https://ibram.org.br/wp-content/uploads/2021/04/Deloitte_value_beyond_compliance-ENG-2020.pdf.> accessed 31 October 2025> 9.

[81] *Vedanta* (n 60) at para 53.

[82] *See also Milieudefensie*, where the Dutch Court of Appeals mentioned that the Guiding Principles, although not legally binding, were endorsed by Shell (see para 7.20) and held that 'In private law relationships, human rights – including protection from dangerous climate change – can have an effect through open standards, such as the social standard of care. The social standard of care in relation to climate can be further defined through soft law such as the UNGP and the OECD guidelines. The content and scope may vary from one company to another, depending on a company's contribution to climate change and its capacity to counter climate change. It follows from the instruments discussed that the social duty of care implies that companies also have an obligation to contribute to the mitigation of dangerous climate change.' (see para 7.55).

[83] Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press 2006) at 74; G. Parchomovsky and A. Stein, 'Torts and Innovation' (2008) 107 Michigan L Rev 285 at 291 ('Under general negligence doctrine, failure to comply with relevant industry customs indicates that a defendant acted negligently.').

[84] If they cannot, it is not clear that any other candidates exist for such a standard, and thus for negligence-based transnational corporate human rights liability.

[85] Guiding Principles (n 2) GP 16.

operations and value chain, tailored to the business context. [86] The process should include assessment, integration, and monitoring of risks and risk-management protocols.[87]

3. Regular public disclosure to explain how the company identifies and addresses its human rights risks.[88]
4. Remediation measures, including trusted grievance processes, to enable prompt response to human rights harms the company has caused or to which it has contributed.[89]

The relevant risk-management elements of this due diligence process for the plaintiffs' claims are (1) assessing risk to stakeholders and (2) integrating measures in corporate protocols to prevent or mitigate those risks. These are the crux of reasonable business conduct in the context of human rights-related tort claims, as they frame the measures a business ought to have implemented to prevent the alleged harm to those to whom it owes a duty of care. The most significant difference between these expectations and those of conventional compliance programs is in the scope and definition of the risks the due diligence should consider, an issue to which we turn below.

In summary, these processes should consider risks to all internationally recognized human rights potentially affected, directly or indirectly, by a company's operations and value chain.[90] They should be tailored to a company's commercial footprint and risk profile.[91] Rather than materiality to the business alone, companies are expected to prioritize risks based on the severity and likelihood of risk to stakeholders, which is generally referred to as a risk's salience.[92] These processes should involve meaningful stakeholder engagement, including with affected groups.[93] Measures to address risks and impacts should be tailored to the company's involvement, the operational context, and salience. And, lastly, measures to identify and address human rights risks effectively should be embedded across the company's operations and functions.[94]

3.3 Adverse Impact: The Cornerstone of Effective Due Diligence

'Adverse impact' is the Rosetta Stone of the Guiding Principles and emerging law. The Guiding Principles expect businesses to 'respect human rights' i.e., to 'avoid infringing on the human rights of others' and 'address *adverse human rights impacts* with which they are *involved*.'[95] An 'adverse impact' is one that 'removes or reduces the ability of an individual or group' to enjoy an internationally recognized human right.[96] Adverse impact grounds the full spectrum of Guiding Principles due diligence, from assessment to remedy to disclosure.[97]

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[86] Ibid.GP 17.
[87] Ibid. GPs 19, 20.
[88] Ibid. GP 21.
[89] Ibid. GPs 22, 29.
[90] Ibid. GP 12; GP 17(a).
[91] Ibid. GP 17(b).
[92] Ibid. GP 17, Commentary.
[93] Ibid. GP 18.
[94] Ibid. GPs 17-21.
[95] United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "*Protect, Respect and Remedy*" Framework' (21 March 2011) UN Doc A/HRC/17/31 [emphasis added]. Notably, this differs from a State's obligation under international human rights law, which is to 'respect, protect and fulfill' human rights.
[96] United Nations Human Rights Office of the High Commissioner, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) at 5, UN Doc HR/PUB/12/02 ('an action [or omission] removes or reduces the ability of an individual to enjoy his or her human rights').
[97] Ibid. GP (n 2) 17.

In defining what counts as human rights harm, 'adverse impact' sets the aim of due diligence and establishes the parameters of expected remedy. In practice, the centerpiece of any corporate risk-management system, particularly for public companies, is an analytical framework that can be deployed consistently by different teams in different functions and regions for ongoing risk identification, prioritization, and management. That framework serves to drive internal accountability and external disclosure. An effective framework will provide practical indicators of risk, definitions of seriousness (from the perspective of shareholders and/or stakeholders), definitions of likelihood, and a typology of responses.

Human rights due diligence is no different. Indeed, a precise framework may be even more important in the human rights context because relevant risks cut across all functions, which means that responses in policies and protocols will frequently need to be implemented by those with little to no understanding of international human rights law. A human rights risk-management framework, the cornerstone of the business standard of care, would need to begin with definitions of the relevant human rights harm the system is designed to prevent, mitigate, or redress. Indicators of adverse impact are thus the first step in developing a pertinent analytical framework to ground Guiding Principles-aligned human rights due diligence. Those indicators are themselves contingent on what rights mean.

The practical implication of this structure is that consistent indicators of harm derived from international human rights law are the foundation of any justiciable standard of care derived from the Guiding Principles. Without such indicators, the due diligence exercise is inherently impressionistic and speculative. Without shared indicators, the standard of care is a chimera. Without a standard of care, corporate accountability for transnational human rights harm — as injury to fundamental dignity protections under international law — will remain elusive. For meaningful tort-based transnational corporate human rights liability, courts will need to be able to determine what constitutes an adverse impact by a business under international human rights law with sufficient precision to guide corporate action and ground stakeholder expectations.

To illustrate the challenge, we return to the case study, focusing on one key internationally recognized human right implicated in the tailings dam collapse.

4. Deriving A Justiciable Indicator for Adverse Impact

4.1 Right to Health and Guiding Principles Due Diligence

Given the nature of the injuries suffered by NCom and DCom — as well as the inherent dangers in iron mining and processing — a crucial right for MiningCo to consider as part of its human rights due diligence would be the right to health. The cornerstone of the right to health under international law is Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which affirms 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[98] Article 12 enumerates four types of measures expected of states to realize the right:

[98] International Covenant on Economic, Social and Cultural Rights, art 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976) [hereinafter 'ICESCR'], art 12. Numerous international human rights treaties have codified the right to health. Art 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination requires States to prohibit discrimination in 'public health, medical care, social security and social services'. International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195, art 5(e)(iv). Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women requires that women receive equal access to health care and that they also receive pregnancy-related care. Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13, art 12. The Convention on the Rights of the Child contains many protections including, for example, guarantees for necessary pediatric care and access to information on pediatric health and nutrition. Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, art 24. Other human rights instruments guarantee the right to health in specific situations such as armed conflict, development, and the workplace. Paul Hunt, Report of the Special Rapporteur on the right of

1. Measures to ensure healthy birth and child development.
2. Measures to improve environmental and industrial hygiene.
3. Measures to prevent, treat and control disease.
4. Measures to 'assure to all medical service and medical attention in the event of sickness'.[99]

The dimension of the right to health most relevant to MiningCo and its risk-management in this case study concerns measures to improve environmental and industrial hygiene.[100] State responsibilities under this dimension include measures to prevent occupational accidents and diseases; ensuring a sufficient source of 'safe and potable water and basic sanitation'; prevention and reduction of exposure to harmful substances that impact health; minimizing causes of occupational health hazards; adequate housing and safe and clean working environments; sufficient supply of food and adequate nutrition; and discouraging the abuse of alcohol, drugs, and other harmful substances.[101]

The first issue when assessing MiningCo's due diligence with reference to the Guiding Principles would be whether the company asked itself the right questions when defining the potential adverse impact on NCom and DCom. That requires assessing how the company translated state responsibilities from international law into business responsibilities to avoid 'remov[ing] or reduc[ing] the ability of an individual or group' to enjoy an internationally recognized human right, which in turn implicates further questions:

1. How does a reasonable company determine if compliance with national law is sufficient to meet the standard?

2. What measures beyond national legal compliance must the company take to align with international law?

3. Is there a threshold level or risk that is acceptable for a reasonable business to take when engaging in an inherently dangerous, regulated activity?

Any court would need to wrestle with these questions when assessing MiningCo's potential liability under a human rights-based tort suit, for these are central to assessing the design of its risk-management system relating to MCB's activities in Brazil. Just as importantly, any responsible company seeking to align its human rights due diligence with the Guiding Principles needs to ask itself these questions to build a coherent risk-management program. A core issue for the court to decide would be whether MiningCo's translation of the right to health from international law into its own operational context was itself reasonable. We consider the challenge — for companies, stakeholders, and courts alike — of that process next.

4.2 Translating Right to Health into Corporate Risk Indicators

The challenge for MiningCo when building a risk-management system tailored to international human rights — and any company seeking to build a risk-management system under the Guiding Principles — is

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everyone to the enjoyment of the highest attainable standard of physical and mental health, 13 February 2003, E/CN.4/2003/58, para 12 (citations omitted).

[99] *ICESCR* (n 96) art 12.

[100] We do not purport here to consider all possible interests that might be implicated under the right to health. The remainder of this discussion, including the proposed definition, focus only on the environment-related dimension of the right.

[101] United Nations Commission on Economic Social and Cultural Rights, 'General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights' (11 August 2000) para 15, UN Doc E/C.12/2000/4 General Comment 14.

that human rights under international law have traditionally been *state-centric* concepts, in that the duty bearers for realizing rights under international instruments, jurisprudence, and commentary are generally governments. While our understanding of human rights is grounded in respect for individual dignity, international human rights themselves are defined through prohibitions and obligations borne by governments.[102] As the UN Human Rights Committee notes, human rights obligations do not have 'direct horizontal effect [as between private actors] as a matter of international law.'[103]

Transposing international human rights law into principled and practical corporate risk indicators requires capturing the purpose of rights while recognizing the reality of the changed institutional characteristics. There are three critical institutional differences between states and businesses to consider in this process. First, states have the power to issue and enforce law. Businesses exercise their power under the aegis of law. Second, states inherently serve a public purpose. The vast majority of businesses are private institutions conceived to serve private ends:[104] that is, even when providing public or quasi-public goods, their leaders are bound by law to pursue in good faith the best interests of the corporation — an end substantially measured by shareholder value.[105] Third, businesses are themselves rights-holders with enforceable claims against government and other private actors. Their responsibilities should accordingly be cognizant of their rights.

These differences should shape the development of relevant right to health risk indicators in three ways: (1) selecting a principle to transpose government responsibilities into a private context; (2) defining where a company has an affirmative duty to protect stakeholders from harms it has not caused; and (3) shaping the threshold level of harm to be considered an adverse impact. We turn to each of these challenges in turn below.

4.2.1 Identifying a principle of transposition

Constitutional rights provide a helpful analogue for translating the structure of fundamental rights from public to private actors. While, in general, constitutional rights directly impose responsibilities on governments, Justice Aharon Barak of the Israeli Supreme Court (as he then was) noted that there is a prevailing recognition of 'a need to limit the power of private parties in their mutual relations'.[106] After canvassing comparative approaches across jurisdictions, he concluded that the best means to this end is by giving constitutional rights 'indirect application' through existing principles of private law.[107] He highlighted, in particular, the 'value concepts' of good faith, reasonableness, and negligence as vehicles to

[102] Roza Pati, 'Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective' (2005) 23 Berkeley J of Intl L 223, 242-243; International Covenant on Civil and Political Rights, art 2(1) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); *ICESCR* (n 95) art 2(1).

[103] United Nations Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' para 8 (May 26, 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

[104] There are limited exceptions to this model in different jurisdictions, such as B Corps, which expand the concept of fiduciary duty to extend to stakeholders beyond shareholders, but they remain extremely rare — 9,500 globally as of 1 March 2025, according to B Lab, which certifies such businesses (see bcorporation.net). By contrast, there are approximately 359 million companies in the world (statista.com).

[105] Julian Velasco, 'Fiduciary Principles in Corporate Law' in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), *The Oxford Handbook of Fiduciary Law, Oxford Handbooks* (Oxford Academic 2019); *Peoples Department Stores Inc. (Trustee of) v Wise*, [2004] S.C.J. No. 64, [2004] 3 S.C.R. 461, para 47 (Can.) [emphasis added] ('In resolving … competing interests, it is incumbent upon the directors to act honestly and in good faith *with a view to the best interests of the corporation*.'); see also Leo E. Strine, Jr., 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' (2015) 50 Wake Forest L Rev 761, 763; *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005); *Mills Acq. Co. v MacMillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989); *Revlon Inc. v Macandrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182, 184 n. 16 (Del. 1986).

[106] Aharon Barak, 'Constitutional Human Rights and Private Law' (1996) 3 Review of Constitutional Studies 218, 258.

[107] ibid.

strike a just balance between conflicting human rights.[108] Such concepts incorporate a proportionality element into the exercise of rights and serve to restrain abuses of power as between private actors.

Good faith and reasonableness are omnipresent constraints on the exercise of rights in public and private law. The doctrine of abuse of rights, for instance, 'is founded upon the notion that an individual may have a right and yet exercise it in such an "abusive" way as to forfeit the right to rely upon it'.[109] Abuse of rights is also well accepted under public international law, where states are expected not to exercise rights beyond the bounds of reasonableness.[110] Just as they do in the application of constitutional rights horizontally, the private law doctrines of good faith, reasonableness, abuse of rights, and equity could provide a principled basis to translate the right to health under international law into a framework to assess adverse impact as between MiningCo, NCom, and DCom. The aim here would not be to create a freestanding legal right but to define the scope of business due diligence and remedy in the context of justiciable norms of human rights governance.

4.2.2 Determining when failure to act may be an adverse impact

Fiduciary duty also shapes how to define relevant omissions when assessing (potential) adverse impacts human rights on the right to health. Omission has analytical significance because of the difference between government and business human rights responsibilities. While states are required to 'respect, protect and fulfill' human rights,[111] businesses have a narrower duty, to *respect* human rights.[112] This core difference means that, while states have defined affirmative duties to act under international human rights law, the primary obligation of businesses is to do no harm. That poses a particular challenge in the context of environment-related human rights, as they are defined by state obligations to 'progressively realize' the rights through regulatory reform and infrastructure investments, among other things.

Determining the scope of actionable omission in the corporate human rights context is thus central to answering what might constitute an adverse impact by MiningCo on the right to health. Overbreadth is the analytical pitfall to manage in answering this question. A company cannot legitimately be expected to take on public responsibilities simply by virtue of its power. As John Ruggie noted regarding the limits of business responsibility, it is not the aim of the Guiding Principles to have companies seek to protect or realize human rights wherever they arguably have the power to do so: 'Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.'[113]

In the United Kingdom actionable omissions in tort arise only where there is a pre-tort relationship that gives rise to a positive duty to act.[114] Similarly, there is no duty to act for a stranger's benefit in American and Canadian law.[115] In all three jurisdictions, special pre-tort relationships must precede an affirmative duty to

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[108] Ibid. at 236.
[109] D. Anderson, 'Abuse of Rights' (2006) 11 Judicial Rev 348.
[110] Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill L J 389 at 405.
[111] Guiding Principles (n 7) GP 1 Commentary [emphasis added].
[112] Ibid. GP 11 [emphasis added].
[113] John J. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corporations & Other Business Enterprises), 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008), para 69, UN Doc A/HRC/8/5 (emphasis added).
[114] Kristy Horsey and Erika Rackley, *Tort Law* (3d edn, Oxford University Press 2013) 74, citing *Smith v Littlewoods Ltd.*, [1987] A.C. 241, [1987] 1 All E.R. 710 (H.L.) (general lack of tortious liability for omissions); see also *Sutradhar v Natural Environment Research Council*, [2006] UKHL 33, [2006] 4 All E.R. 490 (general exclusionary principle for pure omissions); *Stovin v Wise*, [1996] A.C. 923, [1996] 3 All E.R. 801 at 806 (reasons why there is a reluctance to impose omissions liability).
[115] Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts*, (2d ed, Thomson Reuters 2011) 651. See also 2 American Law Institute, *Restatement of the Law Third*, *Torts: Liability for Physical and Emotional Harm* (ALI Publishers 2012); *Osterlind v Hill*, 263 Mass. 73 (1928) (general lack of tortious liability for omissions); *H.R. Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160

act.[116] Recognized special relationships include parent-child, contractual and quasi-contractual relationships, professional relationships, and relationships of authority, control, and supervision.[117] In addition, parties may be said to have taken on particular responsibilities to act to prevent harm to others where they have voluntarily assumed such responsibility or otherwise shaped legitimate expectations regarding their behavior.[118]

Applying these principles to MiningCo when translating right to health into a coherent risk-management framework would need to define *a piori* where failures to invest in measures to protect NCom and DCom's right to health would constitute an adverse impact analysis with reference to its duties (1) under law or (2) under a special relationship defined by contract, authority, control, or other legitimate expectations.

4.2.3 Transposing limitations on rights into thresholds of adverse impact

The last element to note in this translation process is that international human rights, while conceived to protect individual dignity, are defined through 'prohibition norms' and 'requirement norms' aimed at states.[119] The limitations on a right are central to defining its legal scope and content.[120] Across human rights regimes, the scope of most rights is limited by an overarching proportionality principle, permitting states to abridge rights legitimately without abusing them.[121] States may therefore 'interfere' with rights without 'violating' them: 'an interference will only amount to a violation if it cannot be justified at the justification stage.'[122] Justification turns on proportionality, which is defined by an 'appropriate goal' and 'proportionate means.'[123] The former is a threshold requirement tied to a broad array of the state's legitimate governing functions.

The second stage of the proportionality test is more demanding. For an act or law to be a justifiable limit on a right, it must (1) be rationally connected to the appropriate goal; (2) be reasonably necessary 'in that there must not be a less restrictive and equally effective alternative'; and (3) the burden it imposes on the rights-holder must not be disproportionate to the end pursued.[124] A coherent definition of adverse impact on NCom's and DCom's right to health vis-à-vis MiningCo and MCB would need to provide some scope to differentiate between legitimate interference and illegitimate infringement. Otherwise, even *de minimis* impacts incidental to the most responsible and safe form of business conduct would count as actionable human rights harms under the Guiding Principles, overwhelming any practical human rights due diligence program.

4.3.1 Assessing MiningCo's Due Diligence

(1928) (lack of tortious liability against contracting entity by third parties that accrue benefit from the contract); *R. v A.D.H.*, [2013] S.C.J. No. 28, [2013] 2 S.C.R. 269, para 68 (Can.) (omissions liability in Canada requires pre-existing legal duty to act); Philip Osborne, The Law of Torts 78-79 (5th ed, Irwin Law 2015).

[116] See Dobbs and others (n 113) 662-70.

[117] Phillip Osborne (n 113) 78-79; *Galaske v O'Donnell*, [1994] S.C.J. No. 28, [1994] 1 S.C.R. 670 at 672 (Can.).

[118] *Fullowka v Pinkerton's of Canada Ltd.*, [2010] S.C.J. No. 5, [2010] 1 S.C.R. 132 at 135 (Can.) ('the proximity inquiry is concerned with whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved.').

[119] Rosa Pati, 'Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective' (2005) 23 Berkley J Intl L 223.

[120] Ibid. at 225 ('as important as its scope in determining its legal content, as virtually no right is absolute in light of the need to balance individual interests and the requirements of community life.').

[121] Aharon Barak, 'Proportionality and Principled Balancing' (2010), 4 L and Ethics of Human Rights 2, 4-5.

[122] Ibid. at 7.

[123] Ibid. at 6.

[124] Kai Möller, 'From Constitutional to Human Rights: On the Moral Structure of International Human Rights' (2014) 3 Global Constitutionalism 3, 9.

Returning to the litigation in the case study, if the court were to apply the Guiding Principles as the standard of care to MiningCo, a central question would be whether MiningCo's assessment and integration process was of sufficient scope and rigor to align with government and industry expectations — as well as the company's own representations. Following *Cape*, the court would need to consider whether MiningCo had fulfilled its duty to prevent or mitigate the relevant risks to NCom and DCom.[125] Resolving that question turns on whether MiningCo had considered the right risks in its risk-management program. This issue leads directly to whether and how MiningCo integrated indicators of possible adverse human rights impact on the right to health in its human rights due diligence.

To assess the effectiveness of MiningCo's risk-management program through a human rights lens, a court would need to consider first whether MiningCo properly defined the environment-related risks to NCom and DCom. Judging the risk-definition process would require the court to consider the three questions from the outset of this section:

1. How does a reasonable company determine if compliance with national law is sufficient to meet the standard?
2. What measures beyond national legal compliance must the company take to align with international law?
3. Is there a threshold level or risk that is acceptable for a reasonable business to take when engaging in an inherently dangerous, regulated activity?

Considering the institutional differences between states and businesses as duty bearers for rights, the definition would need three elements: (1) threshold level of harm; (2) to the interest protected by the right, adapted to the institutional roles and responsibilities of mining companies; (3) subject to legitimate and proportionate interference if 'reasonably justifiable' under a transposed limitation clause. These elements would form the basis of justifiable risk indicators to ground MiningCo's right to health due diligence, and thus the assessment of whether MiningCo's human rights risk-management system met the standard of care.

For now, there is no legally authoritative definition or method to assess whether MiningCo was, in fact, considering the relevant dimensions of NCom's and DCom's right to health as part of its risk-management program and oversight of MCB. The implication is that, even if NCom and DCom successfully argued that MiningCo owed them a human rights duty of care, negligence-based corporate liability for human rights harm will remain elusive — or at least unpredictable — until courts wrestle with how international human rights expectations shape reasonable corporate behavior.

5. Conclusion

Illustrating a corporate human rights indicator-development process in practice is beyond the scope of this chapter, but all practical risk-management programs — including those related to human rights — depend on risk assessment, which turns on defining the risk so that it can be operationalized, measured, and communicated. Even where a company does not expressly define a risk, it implicitly must deploy criteria to differentiate between decisions and actions that trigger or mitigate the risk and those that do not count. These indicators are thus the cornerstone of a putative standard of care to ground negligence-framed business and human rights litigation.

[125] *Cape* (n 50) at paras 74-79.

Without an authoritative method for translating international human rights law into adverse human rights impact, the promise of the Guiding Principles to ground corporate human rights liability remains unstable. The business and human rights field is consequently left in a place where the only clearly defined minimum is compliance with national law. If that is the only measure of the human rights standard of care applied by courts, then applying the moniker of business and human rights litigation to transnational tort claims is misleading — we are just creating extraterritorial enforcement of national standards, which may ultimately just recreate the world that the Guiding Principles were designed to supersede, with a race to the bottom in national standards.

Developing a principled, practical, and predictable method to translate international human rights law into consistent indicators of human rights harm or adverse impact is an urgent challenge for stakeholders, businesses, courts, and governments alike. Only when such a method exists — and is authoritative — will broad, tort-based corporate human rights liability realize its true potential for the most vulnerable.